In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1694

GEORGE H. BRENNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. Petitioner, a former lieutenant in the United States Navy, who was honorably discharged on June 7, 1968, after having been passed-over for promotion to the rank of Lieutenant Commander by two successive promotion boards, instituted this action in the Court of Claims to recover certain active duty pay and the retirement pay of a Lieutenant Commander. He contends that his pass-overs for promotion, which made discharge mandatory under 10 U.S.C. 6382,[1] were arbitrary, capricious and contrary to law since the Selection Boards improperly considered certain material detrimental to petitioner. Petitioner does not seek reinstatement to the Navy (Pet. App. A-75).

[1] 10 U.S.C. 6382 provides in pertinent part that a Navy Lieutenant such as petitioner "shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander * * * for the second time."

The material which petitioner claims was improperly before the Selection Boards refers to an informal board of investigation inquiry into an accident involving a nuclear missile which occurred aboard the U.S.S. Luce, where petitioner was assigned as weapons officer. Pursuant to the board of investigation's recommendation, a letter of censure in the form of an admonition was issued to petitioner. The letter referred to the missile mishap investigation and listed four personal derelictions on petitioner's part as weapons officer.

The letter of censure was subsequently set aside by Admiral Ruckner, the convening authority of the board of investigation, who issued a letter of instruction concerning the incident to petitioner. By an endorsement to petitioner's file dated January 31, 1968, the Chief of Naval Personnel, referring to Admiral Ruckner's instructions, directed that the investigation not be noted "as a matter of interest" in petitioner's official records (Pet. App. A-64).

Petitioner was considered but rejected for promotion to Lieutenant Commander by two successive Selection Boards in 1966 and 1967 (Pet. App. A-70 — A-71). Under 10 U.S.C. 6382, the second pass-over automatically would have resulted in petitioner's separation from the Navy the following June 30. At his own request, petitioner was discharged on June 7, 1968 (Pet. App. A-74).

Petitioner instituted this action in the Court of Claims seeking active duty and retirement pay at the rank of Lieutenant Commander. The Court of Claims construed petitioner's claim as a request to overturn the Selection Boards' denying petitioner promotion, on the ground that the Boards considered material that was improperly before them (Pet. App. A-38). The court noted the well-established principle that it is not a judicial function to promote members of the military. Finding that petitioner had not

demonstrated that the Selection Boards had considered improper material, the court held that the Boards' actions were not arbitrary, capricious or an abuse of discretion (Pet. App. A-47). The court ruled that petitioner was not entitled to recover active duty or retirement pay, and dismissed his action.[2]

2. The Court of Claims decision is correct, and the petition presents no issue warranting review by this Court.

a. Petitioner's claim for the pay of a Lieutenant Commander assumes his .promotion to that rank from his rank of Lieutenant at discharge. As the Court of Claims noted, however, it is well settled that the courts will not order military promotions. See, *e.g., Orloff* v. *Willoughby,* 345 U.S. 83; *Reaves* v. *Ainsworth,* 219 U.S. 296; *Pauls* v. *Secretary of the Air Force,* 457 F. 2d 294 (C.A. 1); *Arnheiter* v. *Chafee,* 435 F. 2d 691 (C.A. 9); *Payson* v. *Franke,* 282 F. 2d 851 (C.A. D.C.), certiorari denied *sub nom. Robinson* v. *Franke,* 365 U.S. 815. As this court has recognized, "judges are not given the task of running the [military]." *Orloff* v. *Willoughby, supra,* 345 U.S. at 93-94. Thus, as both the majority and the dissenters in the Court of Claims recognized, petitioner is not entitled to back pay on the basis of a judicially-construed promotion (Pet. App. A-39, A-53 — A-54).

b. Moreover, as the Court of Claims found, petitioner failed to establish that material other than that specified by Article B-2201 of the Bureau of Naval Personnel Manual was before the Selection Boards when they were

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[2]Three judges dissented. They relied essentially on the factual findings of the trial judge (which the court overturned) that the Selection Board had considered material not properly before it. (Pet. App. A-51 — A-52). The dissenting judges agreed, however, that petitioner was not entitled to constuctive promotion; they concluded that petitioner could claim only improper separation and pay based on his rank at discharge.

considering his promotion.[3] Indeed, the court found that the evidence was to the contrary, and that the two references to the missile incident which were part of the material before the Selection Boards were proper and not prejudicial.[4] The record supports these factual findings (Pet. App. A-71 — A-73), and in any event their correctness does not warrant further review.[5]

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[3]Article B-2201 of the Bureau of Naval Personnel Manual specifies the contents of the official service record of a naval officer, which record is all that may be considered by the Selection Board. The official service record includes material relating to periodic fitness reports of the officer, biographical information, certificates of security clearances, copies of citations, awards, and letters of commendation or censure.

[4]The two references to the missile incident merely noted the fact that petitioner had been a party to an investigation. One reference occurred in a letter sent by Admiral Eli T. Reich to the 1967 Selection Board recommending favorable consideration of petitioner's promotion (Pet. App. A-56). The other was a notation in the fitness report prepared by Commander J.C. Drake for the period February 20, 1966 — June 30, 1966 (Pet. App. A-70). Neither reference gave any details or results of the investigation.

[5]Since the Court of Claims properly found that the Selection Boards had not considered improper materials, this case is distinguishable from *Weiss* v. *United States*, 408 F. 2d 416 (Ct. Cls.), upon which petitioner relies, where the court's decision rested upon the reliance on improper materials by the Selection Boards.

Moreover, as both the majority and concurring opinions below observed, the proceeding in this case, unlike that in *Weiss*, is not a review of the Navy's Correction Board. As Judge Nichols noted in his concurring opinion, a decision of the Correction Board involves that Board's exercise of discretion; here, however, the question is whether the Selection Board considered improper material.

c. Petitioner argues that he was denied due process because the missile incident was known to the officers of the "Missile Navy" (and thus presumably to the Selection Boards). The court below found, however, that the evidence showed that no member of the Selection Boards who may have known of the incident considered or discussed it. Thus the court correctly held (Pet. App. A-45):

> We must assume in the absence of evidence to the contrary that the members of these selection boards performed their duties as officers of the government in a fair and impartial manner and in accordance with law, and that in so doing they gave [petitioner] due and proper consideration along with all of the other candidates for promotion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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